Kerajaan Malaysia v Dato' Hj Ghani Gilong

FEDERAL COURT (KOTA KINABALU) — CIVIL APPEAL NO 01-4-93
ANUAR CJ (MALAYA), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN FCJJ
3 MAY 1995

Revenue Law *— Income tax — Appeal — Plea of limitation — Whether High Court or special commissioners has jurisdiction — Income Tax Act 1967 s 91(1) & (3)*

Revenue Law *— Income tax — Appeal — Certificate of tax — Whether must be signed by Director General of Inland Revenue — Whether can be signed by Assistant Director General on behalf of Director General — Income Tax Act 1967 ss 136 & 142(1) — Interpretation Act 1967 s 7*

Civil Procedure *— Jurisdiction — Case stated for opinion of High Court on income tax — Whether High Court has full appellate powers — Whether Federal Court's powers also restricted on further appeal — Income Tax Act 1967 Sch 5 para 34*

Civil Procedure *— Stay of execution of judgment — Summary judgment for taxes — Inherent jurisdiction of court — Pending appeal before special commissioners — Whether High Court has power to grant stay — Whether there are special circumstances*

The respondent ('the taxpayer'), was assessed to income tax and additional income tax (on interest and penalties) levied under the Income Tax Act 1967 ('the Act'), in respect of the years of assessment of 1970, 1971, 1972, 1973, 1982, 1983 and 1984, by the Government of Malaysia ('the Revenue). The Revenue started summary proceedings under O 14 of the Rules of the High Court 1980 against the taxpayer for the recovery of tax. In the taxpayer's defence, he argued that: (i) the certificate issued under s 142(1) and signed by the acting Assistant Director General of Inland Revenue, was not a certificate within the meaning of s 142(1) of the Act, as it was not signed by the Director General of Inland Revenue personally; (ii) the Revenue's claim made in the writ of summons was premature as the taxpayer's appeal was still pending before the special commissioners; and (iii) the additional assessment for the year of assessment of 1971 was barred by limitation under s 91(1) and (3) of the Act, as it was levied more than 12 years prior to the date of the issue of the writ of summons. The High Court judge entered judgment against the taxpayer but upheld the defence of limitation regarding the additional assessment. Consequently, he made an order deducting the additional assessment sum of 1971 from the total sum claimed by the Revenue and granted an order for stay of execution on the balance pending determination of the taxpayer's appeal to the special commissioners. The Revenue has appealed.

Held, allowing the appeal:

(1) The very general words of s 136 of the Act, read with s 7 of the Interpretation Act 1967, were sufficient to permit an acting Director-General to sign and to issue a certificate under s 142(1) of the Act for and on behalf of the Director-General.

(2) The High Court has no power to entertain a plea of limitation under s 91(1) and (3) of the Act. Only the special commissioners have such power, the reason being that if the plea of limitation were available in proceedings in court as well as before the special commissioners, then a decision by the High Court on the issue of limitation would prevent the special commissioners from deciding the same issue as they would regard themselves as being bound by the High Court's decision. Alternatively, if the special commissioners did not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the special commissioners on the identical question of limitation. The order of the High Court to deduct the additional assessment for the year of assessment of 1971 must therefore be set aside.

(3) In the exercise of the inherent jurisdiction of the High Court, the judge had the power to grant a stay of execution until determination of the taxpayer's appeal by the special commissioners. But in the instant appeal, there was no formal application for stay supported by an affidavit alleging special circumstances to justify the making of the order. Although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the judge could have granted the order for a stay. Thus, the court had no option but to discharge the order for stay.

Obiter:

(1) The special commissioners are judges of fact and may consider issues which the court is prohibited by s 106(3) from entertaining. However, in finding the facts and drawing inferences of secondary facts from them, the special commissioners must not misdirect themselves and must draw conclusions from facts having probative value.

(2) Pursuant to para 34 of Sch 5 of the Act, it was possible for the taxpayer to appeal against the decision of the special commissioners on a point of law to the High Court by way of case stated. However, the High Court would not exercise its full appellate powers but confine itself to the point of law appearing in the case stated and apply the law to the facts as found by the special commissioners. Thereafter, a further appeal could be brought to the Federal Court which would be subject to the same restrictions as the High Court.

(3) Where summary judgment has been entered against a taxpayer and a stay of execution has been granted pending the final

A determination of an appeal before the special commissioners, and in the event the taxpayer succeeds on its plea of limitation in the appeal, the result of the appeal must override the order of summary judgment.

B **[Bahasa Malaysia summary:**

Responden ('pembayar cukai'), telah ditaksirkan cukai pendapatan dan tambahan cukai pendapatan (akibat faedah dan penalti) yang dikenakan di bawah Akta Cukai Pendapatan 1967 ('Akta itu') untuk tahun pentaksiran 1970, 1971, 1972, 1973, 1982, 1983 dan 1984 oleh Kerajaan Malaysia ('Jabatan Hasil'). Jabatan Hasil telah memulakan prosiding penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap pembayar cukai untuk mendapat kembali cukai tersebut. Pembayar cukai berhujah dalam pembelaannya bahawa: (i) sijil yang telah dikeluarkan di bawah s 142(1) yang ditandatangani oleh pemangku Timbalan Ketua Pengarah Jabatan Hasil Dalam Negeri bukan suatu sijil mengikut maksud s 142(1) Akta itu, oleh kerana ia tidak ditandatangani oleh Ketua Pengarah Jabatan Hasil Dalam Negeri sendiri; (ii) tuntutan yang dibuat oleh Jabatan Hasil dalam writ saman adalah pramasa kerana rayuan pembayar cukai masih menunggu penyelesaian di hadapan pesuruhjaya khas; dan (iii) taksiran tambahan bagi tahun pentaksiran 1971 adalah dihalang oleh had masa di bawah s 91(1) dan (3) Akta itu kerana taksiran tersebut telah dikenakan lebih daripada 12 tahun sebelum tarikh pengeluaran writ saman. Hakim Mahkamah Tinggi telah mencatatkan penghakiman terhadap pembayar cukai tetapi membenarkan pembelaan had masa berkenaan dengan pentaksiran tambahan itu. Lantaran itu, beliau telah membuat suatu perintah untuk menolak jumlah taksiran tambahan itu daripada jumlah keseluruhan yang dituntut oleh Jabatan Hasil dan memberikan suatu perintah untuk penggantungan pelaksanaan penghakiman tersebut berkenaan dengan baki jumlah yang dituntut, sementara menunggu keputusan rayuan pembayar cukai kepada pesuruhjaya khas. Jabatan Hasil telah membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Perkataan-perkataan umum di dalam s 136 Akta itu, dibaca dengan s 7 Akta Tafsiran 1967, adalah mencukupi untuk membenarkan seorang pemangku Ketua Pengarah menandatangani dan mengeluarkan suatu sijil di bawah s 142(1) Akta itu untuk dan bagi pihak Ketua Pengarah.

(2) Mahkamah Tinggi tidak mempunyai kuasa untuk mendengar suatu pli had masa di bawah s 91(1) dan (3) Akta itu. Hanya pesuruhjaya khas mempunyai kuasa sedemikian, kerana jika pli had masa tersebut boleh ditimbulkan di dalam prosiding di mahkamah dan juga di hadapan pesuruhjaya khas, maka suatu keputusan Mahkamah Tinggi tentang isu had masa akan

menghalang pesuruhjaya khas daripada membuat keputusan atas isu yang sama oleh kerana mereka akan menganggap diri mereka sebagai terikat oleh keputusan Mahkamah Tinggi. Sebagai alternatif, jika pesuruhjaya khas tidak menganggap diri mereka sebagai terikat, ini mungkin mengakibatkan keputusan yang tidak konsisten di antara Mahkamah Tinggi dan pesuruhjaya khas atas persoalan had masa yang serupa. Lantaran itu, perintah Mahkamah Tinggi untuk memotong pentaksiran tambahan untuk tahun pentaksiran 1971 itu mesti diketepikan.

(3) Dalam menggunakan bidang kuasa sedia ada Mahkamah Tinggi, hakim mempunyai kuasa untuk membenarkan penggantungan pelaksanaan penghakiman sehingga rayuan pembayar cukai kepada pesuruhjaya khas terhadap pentaksiran diputuskan. Walau bagaimanapun, dalam rayuan ini, tidak terdapat permohonan rasmi untuk penggantungan yang disokong oleh affidavit yang menerangkan keadaan khas untuk menjustifikasi pemberian perintah itu. Walaupun tanggungjawab untuk menunjukkan bahawa terdapat keadaan khas yang menjustifikasikan suatu penggantungan terletak atas pembayar cukai, tidak terdapat apa-apa alasan untuk membolehkan hakim memberi perintah penggantungan itu. Oleh itu, mahkamah tidak mempunyai pilihan lain kecuali melepaskan perintah penggantungan itu.

Obiter

(1) Pesuruhjaya khas merupakan hakim fakta dan boleh mempertimbangkan isu yang mahkamah dilarang daripada mendengar oleh s 106(3). Walau bagaimanapun, dalam usaha mereka untuk mencari fakta dan membuat inferens tentang fakta sekunder daripada fakta tersebut, pesuruhjaya khas tidak boleh salah arahkan diri mereka dan mesti membuat keputusan daripada fakta yang mempunyai nilai probatif.

(2) Mengikut perenggan 34 Jad 5 Akta tersebut, pembayar cukai boleh membuat rayuan terhadap keputusan pesuruhjaya khas tentang suatu perkara undang-undang dengan menyatakan suatu kes untuk pendapat Mahkamah Tinggi. Bagaimanapun, Mahkamah Tinggi tidak akan menggunakan kuasa rayuan sepenuhnya tetapi akan menghadkan dirinya kepada perkara undang-undang yang dinyatakan itu sahaja dan mengenakan undang-undang atas fakta yang telah diputuskan oleh pesuruhjaya khas. Selepas itu, rayuan selanjutnya boleh dibuat kepada Mahkamah Persekutuan yang juga akan tertakluk kepada sekatan yamg sama seperti Mahkamah Tinggi.

(3) Dalam keadaan di mana penghakiman terus telah dicatatkan terhadap seorang pembayar cukai dan suatu penggantungan pelaksanaan terhadapnya telah dibenarkan sementara menunggu keputusan muktamad rayuan di hadapan pesuruhjaya khas, dan jika pembayar cukai tersebut berjaya atas plinya tentang had

masa di dalam rayuan itu, keputusan rayuan itu akan mengatasi perintah penghakiman terus itu.]

Notes

For cases on appeals against payment of income tax, see 10 *Mallal's Digest* (4th Ed) paras 1491–1505.

For cases on appeals by way of case stated, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) see paras 307–309, 2102.

For cases on powers of the court on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) see paras 614–621.

For cases on stay of execution, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) see paras 3120–3125, 3430–3432.

Cases referred to

Arumugam Pillai v Government of Malaysia [1975] 2 MLJ 29 (folld)
Arumugam Pillai NTS v Government of Malaysia [1976] 2 MLJ 72 (not folld)
Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473 (refd)
Comptroller-General of Inland Revenue v NP [1973] 1 MLJ 165 (folld)
Government of Malaysia v Gan Chuan Lian and another action [1992] 1 MLJ 449 (refd)
Government of Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105 (distd)
Government of Malaysia v Ng Song Choon [1975] 1 MLJ 131 (refd)
Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue [1986] 2 MLJ 161 (folld)

Legislation referred to

Income Tax Act 1967 ss 91(1), (3), (3a), 99, 103(4), (5), (5A), 106(3), 136, 142(1), 145(2), Sch 5 para 34
Interpretation Act 1967 s 7
Rules of the High Court 1980 O 14

Appeal from: Civil Suit No K522/87 (High Court, Kota Kinabalu)

Abdul Karim bin Abdul Jalil (Senior Federal Counsel) (*Osman Ujang* with him) (Federal Counsel) for the appellant.
Philip Lee Vui Keong (*Lee & Aziz*) for the respondent.

Edgar Joseph Jr FCJ (delivering the grounds of judgment of the court): Datuk Hj Ghani Gilong, a businessman ('the taxpayer') and the respondent to this appeal, was assessed to income tax and increase of income tax (inclusive of penalties and interest) levied under subsections 4, 5 and 5A of s 103 of the Income Tax Act 1967 ('the Act'), for various sums amounting in all to RM504,052, in respect of the years of assessment 1970, 1971, 1972, 1973, 1982, 1983 and 1984, pursuant to notices of assessment duly sent by ordinary mail and which were deemed tó have been served, having regard to the provisions of s 145(2)(c) of the Act, and

were by s 103(1) of the Act, payable on service of the same, whether or not he appealed under s 99 of the Act against the assessment or composite assessments, as the case might be. A

A certificate purporting to have been issued under s 142(1) of the Act had been signed by the acting Assistant Director General, Puan Norlina bte Zainal, for and on behalf of the Director General of Inland Revenue ('the Director General') giving the name and address of the taxpayer and was, if valid by reason of that provision, sufficient evidence of the amount so due as aforesaid, and sufficient authority for the court to give judgment accordingly. B

The Revenue, having caused to be issued in the name of the Government of the Federation of Malaysia, the writ of summons herein accompanied by a statement of claim annexed thereto against the taxpayer, claiming the total amount aforesaid, and the taxpayer having entered appearance thereto, the Revenue had also caused to be issued a summons for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC'). The taxpayer had affirmed and filed an affidavit in opposition, wherein he raised three separate defences, namely: C D

(1) the purported certificate signed by the acting Assistant Director General of Inland Revenue, was not a certificate within the meaning of s 142(1) of the Act, as it was not signed by the Director General of Inland Revenue personally; E

(2) the claim made in the writ of summons was premature in as much as the taxpayer's appeal against the assessments aforesaid was still pending before the special commissioners, and so barred by reason of art 13(1) of the Federal Constitution, which provides that 'no person shall be deprived of property save in accordance with the law'; and F

(3) the assessment to additional income tax for the year of assessment 1971 had been levied as long ago as 4 August 1984, which was more than 12 years prior to the date of the issue of the writ of summons and, therefore, the claim relating thereto was barred by limitation under s 91(1) of the Act, as illustrated by the cases of *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473, followed in *Government of Malaysia v Gan Chuan Lian and another action* [1992] 1 MLJ 449. G

In the event, the judge in the court below (Syed Ahmad Idid J), had rejected the first and the second of the above defences, but upheld the third, and in consequence, had made an order deducting the sum of RM51,244.16 claimed by way of additional assessment for the year of assessment 1971, from the total sum claimed, being the amount of RM504,052. He had also granted a stay of execution of the judgment in respect of the balance of the sum claimed until determination of the taxpayer's appeal against the aforesaid assessments by the special commissioners. From his decision, in so far as it was held that the claim for additional assessment for the year of assessment 1971 was barred by limitation and his order for stay as regards the balance of the sum claimed, the Government of Malaysia has appealed to this court. H I

As for the first of the above defences, in our view, the very general words of s 136 of the Act, read together with s 7 of the Interpretation Act 1967, are sufficient to permit an acting Director General in the position of Puan Norlina bte Zainal to sign and to issue a certificate under s 142(1) of the Act for and on behalf of the Director General.

As for the second of the above defences, the question raised is sufficiently answered for us against the taxpayer by the cases of *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 and *Comptroller-General of Inland Revenue v NP* [1973] 1 MLJ 165, and we need say no more about it.

The judge was therefore, right in holding against the taxpayer in so far as the first and the second of the above defences were concerned.

In our view, however, the judge was wrong in acceding to the submission based on the limitation point advanced on behalf of the taxpayer, and also wrong for granting a stay pending determination of the taxpayer's appeal before the special commissioners, for reasons which may be briefly stated.

As to the limitation point, the judge had cited the cases of *Government of Malaysia v Ng Song Choon* [1975] 1 MLJ 131, *Chong Woo Yit v Government of Malaysia* and *Government of Malaysia v Gan Chuan Lian.* In particular, he had relied on holding (1) of the headnote to *Chong Woo Yit*, which reads:

> By virtue of the proviso to s 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceedings by the government for any recovery of any tax or interest thereon, although for the purposes of an assessment or additional assessment of tax under s 91 of the Income Tax Act 1967 not made in any year of assessment or within 12 years after its expiration, the Revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment.

Section 91(1) of the Act provides:

> The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

But, s 91(3) of the Act provides, by way of exception to s 91(1), as follows:

> The Director General where it appears to him that —
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) any person has been negligent,
>
> in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of

making good any loss of tax attributable to the fraud, wilful default or negligence in question. A

In considering the plea of limitation based on s 91(1) and (3) of the Act advanced by counsel for the taxpayer, we have read with interest, the following passages in the judgment of Gill CJ when speaking for the Federal Court, in the case of *NTS Arumugam Pillai v Government of Malaysia* [1976] 2 MLJ 72. B

Touching on the argument of counsel for the appellant in that case, his Lordship said this [at p 73]:

> The main contention by counsel for the appellant in support of these two grounds was that the additional assessments of income tax for the years of assessment 1953 and 1958 were statute-barred because they were not made before the expiration of 12 years from the respective years of assessment. For this he relied on s 91(1) of the Act which reads as follows: ... [His Lordship then reproduced s 91(1).] C

His Lordship next touched on the argument of counsel for the respondent, as follows: D

> Counsel for the respondent on the other hand contended that there was wilful default on the part of the appellant in that he failed to disclose part of his income when he submitted his returns for the years of assessment 1953 and 1958 so that s 91(3) of the Act applied. That section reads as follows: ... [His Lordship then reproduced s 91(3).] E

His Lordship then continued:

> The learned counsel further contended that this issue, if there was anything in it, should be raised by the appellant before the special commissioners for income tax to whom an appeal has in fact been lodged. F

His Lordship then concluded:

> The view which we took was that there was no substance in what counsel for the appellant contended and that what counsel for the respondent said in reply had substantial merit in it. In our judgment limitation as such does not apply to any proceedings by the Government for the recovery of any tax. G This would seem clear from the proviso to s 33(1) of the Limitation Ordinance 1953. Reading s 91 of the Income Tax Act 1967 as a whole it would seem clear that, quite apart from any form of fraud, the words 'within twelve years after its expiration' are irrelevant where there has been any wilful default on the part of a taxpayer in disclosing part of his income for any particular year of assessment. H
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> It was contended for the appellant that there was no allegation of wilful default in the affidavit in support of the plaintiff's application under O 14. But the fact that additional assessments were made for the years of assessment 1953 and 1958 was sufficient to indicate such default. In any event, s 106(3) of the Income Tax Act 1967 provides that 'in any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5)'. In the circumstances the learned judge had no power to entertain any of the pleas raised before him I

by the appellant in opposing the plaintiff's application for leave to sign final judgment.

With respect to Gill CJ, we find his aforesaid conclusions patently inconsistent. On the one hand, when considering the submission of counsel for the taxpayer appellant that there had been no allegation of wilful default in the affidavit filed in support of the application under O 14 of the RHC, he had rejected it on the grounds that the fact that additional assessments had been made for the previous years concerned was sufficient to indicate such default, thereby clearly implying that the High Court *had the power* to decide on the plea of limitation based on s 91(1) and (3) of the Act. But, on the other hand, almost in the same breath and in the same paragraph, he had relied on s 106(3) of the Act, and concluded that the judge *had no power* to entertain *any* of the pleas raised before him by the taxpayer appellant (including, of course, the plea of limitation).

In our view, the High Court has *no power* to entertain a plea of limitation under s 91(1) and (3) of the Act advanced by a taxpayer. However, the special commissioners have such power. Our reasons for these conclusions now follow.

If counsel for the taxpayer were correct in his contention that the plea of limitation based on s 91(1) and (3) of the Act is available to him in proceedings for recovery of tax brought in court as well as in proceedings before the special commissioners, then a decision by the High Court on the question of limitation would prevent the special commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court, thereby abdicating their fact-finding function of determining whether there has been fraud or wilful default within the meaning of s 91(3a) of the Act. Alternatively, even if the special commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the special commissioners on the identical question of limitation. These would not be reasonable results and, what is unreasonable, cannot be the law.

In so holding, we do not overlook the point that further appeals lie to the High Court by way of case stated on a point of law, against the decisions of the special commissioners pursuant to para 34 to Sch 5 of the Act, and thereafter, to the Federal Court. Therefore, it is perfectly possible that the plea of limitation in this case may ultimately arise for determination by this court, but this would be by way of a different route, and the powers which this court would exercise in such a situation would not be full appellate powers. This is because the object of an appeal by way of case stated is clearly to provide a limited right of appeal from the special commissioners to the High Court, in cases where a point of law is involved. The High Court would then confine itself to the point of law appearing in the case stated, and having answered it, would apply it to the facts as found by the special commissioners, who are judges of fact. But 'in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having

probative value' (per Lord Diplock in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* [1986] 2 MLJ 161 at p 169 col 2F). A

Thereafter, an appeal may be brought from the decision of the High Court to the Federal Court, but in exercising that jurisdiction, the Federal Court would be subject to the same restrictions as that to which the High Court is subject. In other words, in such a situation, the Federal Court too would not be exercising full appellate powers, unlike an appeal from a decision of the High Court given in the exercise of its original jurisdiction when it would be exercising full appellate powers. B

For the sake of completeness, we must add that in a situation where summary judgment has been entered against a taxpayer in proceedings by way of suit for the recovery of tax, and a stay of execution in respect thereof granted pending the final determination of an appeal before the special commissioners, and if in such appeal, a plea of limitation is successfully invoked by such taxpayer, then we are of the view that the result of such appeal before the special commissioners (unless reversed on further appeal), being in conflict with the order for summary judgment, must override the order for summary judgment. We say so because the special commissioners are the judges of the facts, and have the jurisdiction to consider not only a plea of limitation based on s 91(1) and (3) of the Act but also other issues such as whether the amount of tax sought to be recovered is excessive, incorrectly assessed or incorrectly increased, all of which are issues which the court in proceedings for recovery tax by suit is prohibited by s 106(3) of the Act from entertaining. C D E

Having said that, we must go on to say that the judge's order deducting the sum of RM51,244.16 claimed by way of additional assessment for the year of assessment 1971, from the total sum of RM504,052 was wrong, and we therefore had no option but to set it aside. We need hardly add that the taxpayer is, of course, at liberty to pursue the limitation point in his appeal before the special commissioners. F

As for the judge's order for stay in regard to the balance of the sum claimed by the Revenue, we consider that the judge had the power to grant a stay and we need no more than refer to the following passage in the judgment of Gunn Chit Tuan CJ, when speaking for the Supreme Court in *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 (at p 475 col 2D–E): G

> ... However, as it was not due to any fault on the part of the taxpayer that his appeal to the special commissioners has still not been heard since 1985, in the exercise of our inherent jurisdiction we ordered a stay of execution until determination by the special commissioners of the taxpayer's appeal against the assessments raised against him ... H

We would interpolate, to add, that in another tax appeal, heard at the same sitting at which the instant appeal was heard, we had indeed upheld an order for stay made by the High Court at Tawau, Sarawak, because we are satisfied that the judge (Ian Chin J) had ample material before him to justify the granting of an order for stay, and there were therefore no I

A grounds for us to interfere with the exercise of his discretion. (See *Government of Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105.)

However, in the instant appeal, the question arose whether having regard to the particular circumstances of the case, the judge was entitled to exercise his power to grant a stay.

B We noted, that in the instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorized agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the judge could have granted the order for a stay. The *Jasanusa* case, was therefore readily distinguishable, on the facts. We thus had no option but to discharge the order for stay.

In the result, the appeal was allowed, the judgment of the court below set aside, and in lieu thereof, we substituted the orders aforesaid. The deposit paid into court by way of security for the costs of the appeal D was ordered to be paid out to the appellant to account of its taxed costs.

Appeal allowed.

Reported by Prof Ahmad Ibrahim

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